

NO. COA13-881-2

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

SHELBY J. GRAHAM,
Plaintiff,

v.

Guilford County
No. 12 CVS 4672

DEUTSCHE BANK NATIONAL TRUST
COMPANY, as Trustee under Pooling
and Servicing Agreement dated as of
November 1, 2005, Morgan Stanley
Home Equity Loan Trust 2005-4
Mortgage Pass through Certificates,
Series 2005-4,
Defendant/Third-Party Plaintiff,

v.

BRANCH BANKING AND TRUST COMPANY,
Third-Party Defendant.

Appeal by defendant from order entered 19 March 2013 by Judge
Lindsay R. Davis, Jr. in Guilford County Superior Court.
Originally heard in the Court of Appeals 11 December 2013.
Petition for Rehearing allowed 13 August 2014.

*Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for
plaintiff-appellee and third-party defendant-appellee.*

*Roberson Haworth & Reese, PLLC, by Alan B. Powell and
Christopher C. Finan, for defendant/third-party plaintiff-
appellant.*

DAVIS, Judge.

Deutsche Bank National Trust Company ("Defendant") appeals from the trial court's order awarding summary judgment in favor of Shelby J. Graham ("Plaintiff") and Branch Banking and Trust Company ("BB&T") on Plaintiff's trespass claim. On 1 July 2014, this Court filed an opinion reversing the trial court's order and remanding for the entry of summary judgment in favor of Defendant. On 4 August 2014, Plaintiff filed a petition for rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. We granted Plaintiff's petition for rehearing on 13 August 2014, and after careful review upon rehearing, we conclude that the trial court's order should be affirmed.

Factual Background

Plaintiff and Defendant are the owners of two adjoining parcels of land in the Mayfield Village subdivision ("Mayfield Village") in Guilford County, North Carolina. Plaintiff acquired Lot 1, Section 1 of Mayfield Village ("Lot 1") by general warranty deed on 25 July 1996.¹ Plaintiff did not have Lot 1 surveyed at the time of purchase. Defendant acquired Lot 2, Section 1 of Mayfield Village ("Lot 2") pursuant to a trustee's deed recorded

¹ The deed listed Shelby G. Coffey – Plaintiff's married name – as the grantee. Plaintiff is no longer married, and in 2001, Plaintiff executed and recorded a deed conveying Lot 1 to Shelby J. Graham.

on 28 May 2010. Similarly, Defendant did not have Lot 2 surveyed at the time it acquired the property.

In September of 2010, one of Plaintiff's neighbors approached her and expressed an interest in purchasing Lot 2 from Defendant. Plaintiff's neighbor asked her if she was aware "that there was a property line dispute between [Lot 1] and [Lot 2]." Plaintiff replied that she did not know of any such dispute.

In early 2011, another individual, Danny Frazier ("Mr. Frazier"), approached Plaintiff, expressed an interest in acquiring Lot 2, and inquired about a property line dispute. At some point, Mr. Frazier had the property surveyed, and the survey – which he provided to Plaintiff – indicated that portions of the house and septic system on Lot 2 encroached on Lot 1.

Plaintiff's title insurance company then contacted Boswell Surveyors, Inc. to prepare a survey of the property ("the Boswell survey"). The Boswell survey likewise indicated that the house and septic system on Lot 2 – which were constructed in 1994 – are "in fact partially located on Lot 2 Mayfield Village and partially encroach[] over onto Lot 1."

On 8 March 2012, Plaintiff's attorney sent a letter to Defendant demanding that the encroaching structures be immediately removed from Lot 1. The letter stated that if Defendant did not respond within seven days, a civil action would be filed.

Twelve days later, Plaintiff filed a complaint against Defendant in Guilford County Superior Court alleging that the encroaching structures were an "ongoing and continuing trespass" on her property. On 23 May 2012, Defendant filed an answer, counterclaims for reformation of its deed and to quiet title, and a third-party complaint against BB&T, the holder of the deed of trust encumbering Plaintiff's property. Defendant filed an amended answer on 18 July 2012, adding a counterclaim for adverse possession. Defendant voluntarily dismissed its counterclaim for adverse possession on 31 October 2012.

On 13 February 2013, Plaintiff and BB&T filed a joint motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Following a hearing, the trial court entered an order on 19 March 2013 granting summary judgment in favor of Plaintiff and BB&T on Plaintiff's trespass claim and ordering Defendant to remove the encroaching structures. Defendant appealed to this Court.

Analysis

In our prior opinion in this case, we held that summary judgment in favor of Plaintiff and BB&T was improper because Plaintiff was not in possession of the property when the trespass initially occurred and, therefore, had failed to establish the first element of a claim for trespass. In so holding, we relied

on this Court's decision in *Woodring v. Swieter*, 180 N.C. App. 362, 637 S.E.2d 269 (2006). Upon reconsideration, however, we conclude that the portion of *Woodring* we relied upon in our opinion is inconsistent with prior decisions of North Carolina's appellate courts regarding the law of continuing trespass to real property.

"[A] claim of trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (citation and quotation marks omitted). In *Bishop v. Reinhold*, 66 N.C. App. 379, 384, 311 S.E.2d 298, 301, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984), this Court addressed the law of continuing trespass to real property. In *Bishop*, the defendants constructed their new house in such a manner that a portion of the home encroached upon the plaintiffs' property. *Id.* at 380, 311 S.E.2d at 299. The plaintiffs brought a trespass claim seeking the removal of the encroaching portion of the house, and the defendants asserted the three-year statute of limitations as an affirmative defense. *Id.* at 384, 311 S.E.2d at 301. We held that the plaintiffs' action seeking removal of the encroachment "would not be barred until defendants had been in continuous use thereof for a period of twenty years so as to acquire the right by prescription." *Id.* We reasoned that a

defendant's wrongful maintenance of a structure encroaching upon the plaintiff's property "is a separate and independent trespass each day it so remains" such that the three-year statute of limitations applicable to trespass claims begins to run every day the encroaching structure remains on the plaintiff's land. *Id.*

While the present case does not present a statute of limitations issue, we construe the precedential effect of *Bishop* as encompassing the issue presented here. Implicit in the holding of *Bishop* is the principle that the first element of a trespass claim may be satisfied even where – as here – the landowner asserting the claim did not own the property at the time the original trespass was committed as long as she was in possession of her land while the trespass was ongoing. Accordingly, subsequent landowners who, like Plaintiff, purchase the subject property after the encroaching structure has already been built may still meet the first element of a trespass claim given that the maintenance of the encroaching structure is itself a trespass that continues each day the encroachment exists. *See Adams Creek Assocs. v. Davis*, ___ N.C. App. ___, ___, 746 S.E.2d 1, 9, *disc. review denied*, 367 N.C. 234, 748 S.E.2d 322 (2013) (determining that plaintiffs stated valid claim for trespass even though defendants' encroaching structures were built before plaintiffs acquired possession of property at issue).

Such an interpretation is also consistent with caselaw from our Supreme Court. In *Caveness v. Charlotte, Raleigh & S. R.R. Co.*, 172 N.C. 305, 90 S.E. 244 (1916), the Supreme Court discussed the circumstances under which the right to recover on a trespass theory passes to a subsequent landowner. The Court explained that

[a] subsequent purchaser cannot recover for a completed act of injury to the land, as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner, in the first case for a continuing trespass, and in the latter for a fresh injury.

Id. at 309, 90 S.E. at 246 (citation and quotation marks omitted).

We note that this analysis is similarly in harmony with generally accepted principles of the law of trespass. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 83 (5th ed. 1984) ("[W]here the defendant erects a structure . . . upon the land of the plaintiff, the invasion is continued by a failure to remove it. In such a case, there is a continuing wrong so long as the offending object remains. A purchaser of the land may recover for the continuing trespass, and a transferee of the defendant's interest in the chattel or structure may be liable."); see also 75 Am.Jur.2d *Trespass* § 29 (2007) ("[I]f a possessory interest in land has been transferred after the actor placed something on the land that constitutes a continuing trespass, a

transferee of the land may maintain an action for continuing the trespass there."); 87 C.J.S. *Trespass* § 26 (2010) ("If a trespass is continuing, any person in possession of the land at any time during its continuance may maintain an action for trespass."). Indeed, as Plaintiff notes in her petition for rehearing, a contrary holding would allow for a private taking of the portion of the landowner's property upon which the encroachment sits – a result that the jurisprudence of our State does not permit.

Here, the trespass at issue is one that continues to affect Plaintiff's possession of her property and is clearly continuing in nature. See *Young v. Lica*, 156 N.C. App. 301, 305-06, 576 S.E.2d 421, 424 (2003) ("An essential right inuring the ownership of real property is the ability to exclude others from the property. When one builds upon another's land without permission or right, a continuing trespass is committed."). Therefore, because it is undisputed that Plaintiff was in possession of her property while the encroaching structures remained on her land, she has satisfied the first element of a trespass claim.

In reaching a contrary result in our prior opinion in this case, we relied on this Court's decision in *Woodring*. In *Woodring*, the defendants constructed an underground water pipeline that encroached upon the neighboring property. *Woodring*, 180 N.C. App. at 366, 637 S.E.2d at 274. Gary and Henry Woodring, who each at

varying times owned the neighboring property, filed a complaint against the defendants alleging various claims, including a claim for trespass. *Id.* The trial court granted summary judgment in favor of the defendants on the trespass claim, and we affirmed the trial court's ruling. *Id.* at 364, 637 S.E.2d at 273.

In reaching our conclusion that summary judgment in the defendants' favor was proper, we first noted that Henry Woodring did not have standing to bring a trespass claim because he had conveyed all of his interest in the property to Gary Woodring prior to the filing of their complaint. *Id.* at 367, 637 S.E.2d at 275. We then concluded that Gary Woodring was also unable to prevail on his trespass claim against the defendants, stating the following:

The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. Plaintiff Gary Woodring obtained no legally recognized interest [in the land] until Henry deeded his interest in the two acre parcel to Gary in November 1998, approximately six years after the installation of the waterline – the date when the original trespass was committed. As a result, plaintiff failed to satisfy the first element of a claim for trespass, and, accordingly, summary judgment in favor of defendants was proper.

Id. at 376, 637 S.E.2d at 280-81 (citations, quotation marks, and emphasis omitted).

It is well established that as a general rule we are bound by the prior decisions of this Court. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). However, it is also well settled that "where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *Respass v. Respass*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 701 (2014) (citation and quotation marks omitted).

On rehearing, we determine that we are not bound by the portion of the *Woodring* decision suggesting that a trespass claim can never succeed when the party asserting the claim was not in possession of the property at the time the unauthorized entry *first* occurred. Such a proposition is inconsistent with both our earlier opinion in *Bishop* and our Supreme Court's discussion of the law of continuing trespass in *Caveness*. Therefore, we conclude that *Woodring* does not control the outcome of the present case. See *Respass*, ___ N.C. App. at ___, 754 S.E.2d at 702.

Defendant next contends that summary judgment was improper because Plaintiff cannot establish the second element of her trespass claim in that she failed to show that *Defendant* committed an unauthorized entry onto her property. Specifically, Defendant

argues that it did not personally construct either of the encroaching structures, was not in possession of the property when the structures were first built, and is "a mere successor in title" to the party who committed the original unauthorized entry onto Plaintiff's property.

However, as our Court explained in *Bishop*, a defendant's wrongful maintenance of an encroaching structure is itself a "trespass each day it so remains" and constitutes a distinct wrong. *Bishop*, 66 N.C. App. at 384, 311 S.E.2d at 301. Thus, because it is undisputed that Defendant failed to remove the encroaching structures from Plaintiff's property, the second element of Plaintiff's trespass claim is likewise established. See Restatement (Second) of Torts § 161(2) (1965) ("A trespass may be committed by the *continued presence* on the land of a structure, chattel, or other thing which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing." (emphasis added)). Accordingly, Defendant's argument on this issue is overruled.

Because the forecast of the evidence in this case showed that all of the elements of a trespass claim were satisfied, the trial court's order granting summary judgment in favor of Plaintiff and

BB&T and issuing a mandatory injunction requiring Defendant to remove the encroaching portions of the structures was proper. See *Williams v. S. & S. Rentals, Inc.*, 82 N.C. App. 378, 383, 346 S.E.2d 665, 669 (1986) ("[T]he usual remedy for a continuing trespass is a permanent injunction which in this case would be a mandatory injunction for removal of the encroachment.").

Conclusion

For the reasons stated above, we affirm the trial court's 19 March 2013 order granting summary judgment in favor of Plaintiff and BB&T on Plaintiff's claim for trespass.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.